AMERICAN INTERNATIONAL ASSURANCE CO LTD

v

SEE AH YU

HIGH COURT MALAYA, KUANTAN
DATO' ARIFIN ZAKARIA J
[CIVIL APPEAL NO: 12-33 OF 1995]
19 JUNE 1996

INSURANCE LAW: *Insurance policy – Basis clause – Breach – Failure by assured to furnish true statements – Effect – Whether a breach of warranty – Whether paramount duty of assured to answer questions truthfully – Whether insurer could repudiate liability.*

CONTRACT: *Contract of insurance – Construction – Obligation of assured to make full disclosure – Whether to be strictly construed – Contra Proferentum rule – Whether subject to rule of reasonable interpretation.*

CONTRACT: *Contract of insurance – Warranty – Breach of warranty of basis clause in insurance policy – Whether a breach of warranty – Whether insurer entitled to repudiate liability.*

This was an appeal against the decision of the learned Sessions Judge for allowing the respondent's claim under a personal accident policy (the policy) issued by the appellant to the respondent's husband (the deceased), on the ground that the deceased had died as a result of falling off a motor lorry while attending to the logs on the said lorry. The facts showed that on various occasions prior to proposing for the policy, the deceased had been given medical treatments at a certain clinic in Kuantan. However, upon proposing for the policy, the deceased did not disclose the fact of these treatments to the appellant, notwithstanding that a question had been posed to him in the proposal form, as to whether he had ever been *"under observation or had medical or surgical advice or treatment or been hospital-confined"*, and notwithstanding further that the declaration that he had to sign specifically stated that his answers to the insurer's questions formed the basis of the contract and that any untrue statement would render the policy null and void.

In the Court below, the appellant disclaimed liability on the ground that there had been a breach of warranty of the basis clause. The Sessions Judge, however, took the the view that the question put to the deceased was vague in nature and that, in the circumstances, bearing in mind the fact that the deceased had never been hospitalised, or treated at the hospital, his answer to the question was quite proper. The facts further showed that the doctor who examined the deceased, one Dr. Azizah, had given evidence to the effect that the cause of death was that of a disease called Gastro-Intestinal Tract Bleeding (GITB), but her evidence had been rejected by the Sessions Judge on the ground, apparently, that no post-mortem had been carried out.

Before the learned appeal Judge, the questions that arose were (i) whether on the facts, the deceased had breached the basis clause of the policy such as to discharge the appellant of their obligation thereunder and (ii) whether the Sessions Judge was wrong in rejecting the evidence of Dr. Azizah.

Held:

[1] The learned Sessions Judge had come to an erroneous decision on the facts. In particular, the learned Judge had failed to give due weight to the evidence of Dr. Azizah as to the cause of death of the deceased. The learned Judge did not consider or failed to give due weight to her evidence wherein she unequivocally stated that the cause of death was upper Gastro-Intestinal Tract Bleeding.

[2] On the proper construction of the term "medical advice or treatment", the deceased did receive medical advice or treatment from the clinic between 5 February 1983 to 4 December 1986. This being the case, it is incumbent upon the deceased to make full disclosure of the medical advice or treatment that he has had and to give full particulars of the same as required by the form. This the deceased failed to do.

[3] It is not open for the deceased to say that he did not disclose the particulars on the medical treatment because he considered it to be of little importance. The complaint may be minor but it is not the consideration here. It is for the appellant to decide whether the complaints are of serious or minor nature.

[4] The law is that that there must be strict and exact compliance with the obligation or statement which is warranted. Whilst it is true that the rule of strict compliance is mitigated in practice by the application of the *contra proferentum* rule, it ought to be noted that the *contra proferentum* rule is always subordinate to the rule of reasonable interpretation.

[5] The failure of the deceased to disclose the medical advice or treatment that he received at the clinic, therefore, is a breach of the basis clause and for that reason the appellant was discharged from its obligations on the policy. It is settled law that in the event of a breach of this warranty, the insurer can repudiate liability of the policy irrespective of the issues of materiality.

[Appeal allowed]

Cases referred to:

Dawsons Limited v. Bonnin & Others [1992] 2 AC 413 ***(foll)***

Thomson v. Weems and Others [1884] 9 AC 671 ***(foll)***

Development & Commercial Bank Bhd. v. Num Tjuan Sdn. Bhd. [1989] 1 MLJ 475 ***(refd)***

For the appellant - Mubashir Mansor; M/s. Skrine & Co.
For the respondent - S. Thilagavathy; M/s. Balendran Chong Bodi & Noorhuda

JUDGMENT

Arifin Zakaria J:

This is an appeal from the decision of the learned Sessions Judge in allowing the respondent/plaintiff's claim under a personal accident policy issued by the appellant/defendant in favour of one Hoo Toon Seng, deceased. It may be convenient at the out set to summarise the facts of the case, which are as follows. On 8 December 1986, the deceased, who was a lorry driver, was alleged to have fallen from the motor lorry while attending to the logs at the back of the motor lorry. He was immediately taken to the Segamat Hospital but succumbed to his death on the same day. The respondent who was the wife of the deceased is the beneficiary under the said policy. She then claimed from the appellant for the sum insured under the policy. The appellant rejected the claim and hence this claim.

The issues before the Court as rightly stated by the learned Sessions Judge are two, namely:

(a) Did the deceased commit a breach of the basis clause; and

(b) Was the death of the deceased caused by any cause other than those specified in the policy.

I shall deal with these two issues in turn.

Basis Clause

Basis clause refers to the warranty given by the assured as to the accuracy of the statements contained in his proposal/application form which in practice is incorporated into the terms of the policy. This warranty is contained in the declaration found at the foot of the form.

The declaration that the proposer had to sign contained the elements, namely, first that the answers to the insurer's questions were made the basis of the contract between the assured and the insurer, and secondly, that any untrue statement should render the insurance policy null and void. It is settled law that in the event of a breach of this warranty, the insurer can repudiate liability on the policy irrespective of the issues of materiality (see *Dawsons Limited v. Bonnin & Others* [1992] 2 AC 413. As stated by Lord Watson in *Thomson v Weems and Others* [1884] 9 AC 671, at p. 689, "When the truth of a particular statement has been made the subject of warranty, no question can arise as to its materiality or immateriality to the risk, it being the very purpose of the warranty to exclude all controversy upon that point." Further it has always been the law that there must be strict and exact compliance with the obligation or statement which is warranted. The rule of strict

compliance is, however, mitigated in practice by the rules of construction which sometimes have the effect of reducing the scope of a warranty. In this connection it may be noted that the *contra proferentum* rule is adopted by the Court in interpreting the warranty. However, it has to be borne in mind that the *contra proferentum* rule is always subordinate to the rule of reasonable interpretation.

With that as background I shall consider the relevant question upon which the appellant is relying to repudiate liability on the policy. The said question reads as follows:

> 5. Have you ever been under observation or had medical or surgical advice or treatment or been hospital-confined during the past 5 years?

The deceased answered the above question in the negative. The appellant called one Dr. Lim Moon Seng of Klinik Kuantan (SD3). He admitted that he wrote the letter D3 in reply to the letter D11 from the appellant. The letter D3 contains the dates of consultation and the diagnosis of the deceased by SD3. The relevant part of the letter reads:

> With reference to your letter re No: C1/PLK/DC/87(56) dated 13th May, 1987, here are the information required:
>
> **Q1, Q2, and Q10**:- Dates of Consultations and Diagnosis.

1st Consultation 5/2/83	Rt. Orchitis (Inflammation Rt Testis).
18/2/83	Rt. Orchitis (Inflammation Rt Testis).
24/2/83	URTI (Upper Respiratory tract Infection).
24/3/83	Bilateral Conjunctivitis (Sore Eyes).
14/2/84	URTI
9/9/84	Injury resulting in Haematoma in lower jaw (chin)
18/5/85	URTI
2/3/86	URTI
20/5/86	URTI
4/12/86	URTI

> Q3 - The insured was never treated for any 'Upper Gastro-Intestinal tract' problem in this clinic.
>
> Q4 - to Q9 - As such, there was no test, investigation or diagnosis made. He was never referred to us by other doctor or referred to another doctor.

Relying on the letter D3 and the evidence of SD3 the appellant contends that the deceased had breached the basis clause by not disclosing the treatment that he had received from Klinik Kuantan. By reason of the said breach, therefore, the appellant contends that the appellant is discharged from the obligation arising on the policy. The respondent, on the other hand, contends that there was no breach of basis clause by the deceased. The respondent contends that question 5 on its reasonable interpretation can give rise to doubt as to whether it includes ordinary medical treatment that one receives from a clinic for common cold and the like and the benefit of such doubt should, relying on the *contra proferentum* rule, be given to the assured. The learned Sessions Judge agreed with the submission of the respondent He said in his judgment:

> Selepas saya meneliti penghujahan kedua-dua Peguam saya berpuashati bahawa simati tidak melakukan apa-apa pemecahan basis clause semasa menjawab soalan 5 ini. Saya bersetuju soalan ini adalah banyak kekaburan dan keraguan. Dari soalan ini seseorang akan keliru untuk memberi jawapan yang tepat iaitu samada pernah dimasukkan ke hospital, pernahkah dibedah atau di bawah permerhatian pihak hospital selama 5 tahun sebelum polisi diambil oleh simati.
>
> Pada pendapat saya oleh kerana simati hanya pergi mendapat rawatan di klinik swasta sahaja sudah tentu difikirkannya jawapannya adalah "No". Ini adalah kerana dia tidak pernah mendapat rawatan di hospital atau dibedah atau di bawah pemerhatian pihak hospital.
>
> Perlu ditegaskan disini bahawa perkataan "clinic" tidak ada di dalam soalan in:Sekiranya perkataan "clinic" ada dinyatakan di dalam soalan ini pada pendapat saya - simati akan menjawab "Yes".

With respect, I could not agree with the view of the learned Sessions Judge. I find that question 5 clearly refers to "medical or surgical advice or treatment" independently of the words "hospital confined". The word "treatment' according to the *Shorter Oxford English Dictionary (Third Edition*) includes "management in the application of remedies; and medical or surgical application or service." Therefore, on the proper construction of the term medical advice or treatment, I am of the view that the deceased did receive medical advice or treatment from SD3 between 5 February 1983 to 4 December 1986. The complaints may be minor in nature but that is not the consideration here. What is material is whether the deceased received any medical advice or treatment during the past five years prior to the date of the application. It is incumbent upon the deceased to make full disclosure of medical advice or treatment he has had and to give full particulars of the same as required by the application form. It is for the appellant to decide whether the complaints are of serious or minor nature. The decision whether to accept the proposal from the applicant lies solely with the appellant after considering all the materials disclosed in the application form. It is not open to an applicant who fails to make full disclosure to say afterwards that he did not disclose certain particulars

because he considered it to be of little or no consequence. On the above premises I, therefore, hold that the failure of the deceased to disclose the medical advice or treatment he received from Dr. Lim Moon Seng of Klinik Kuantan is a breach of the basis clause and for that reason the appellant is discharged from its obligation on the policy.

Cause of Death

The next question to be determined is what was the cause of death of the deceased. The respondent contends that the death was caused by the fall from the lorry, while the appellant says it was caused by the disease called Gastro-Intestinal Tract Bleeding (GITB). The learned Sessions Judge agreed with the respondent. The learned Counsel for the respondent urged me not to interfere with the finding of the learned Sessions Judge, it being a finding of fact. But as stated by Lee Hun Hoe CJ (Borneo) in *Development & Commercial Bank Bhd v Num Tjuan Sdn Bhd* [1989] 1 MLJ 475 at p. 477 - "It is of course the duty of an appellate Court to be a judge of fact as well as of law. At the same time it would be abrogating its function if it made a hard and fast rule never to interfere with the findings of fact and felt bound to support a judgment which, on review of all the evidence, it considered to be clearly wrong".

On review of all the evidence before the Court, I found that the learned Sessions Judge had come to an erroneous decision on the facts. He failed to give due weight to the evidence of Dr. Azizah bt Abd. Rahman (SD1). This is apparent from the reading of his judgment where he stated:

> Dr. Azizah hanya memberi keterangan berdasarkan kepada pendapatnya sahaja dan bukan berdasarkan kepada rekod perubatan simati. Di dalam keterangannya Dr. Azizah bersetuju post-mortem perlu diadakan untuk mendapat tahu sebab sebenar kematian simati tetapi di dalam kes ini tidak ada post-mortem telah dilakukan terhadap simati. Oleh itu saya dengan hormatnya menolak keterangan Dr. Azizah yang mengatakan simati telah meninggal dunia kerana penyakit Gastro Intestinal Bleeding.
>
> Pendapat saya ini disokong oleh keterangan isteri simati iaitu plaintif dan rakan-rakannya yang mengatakan sebelum meninggal dunia simati tidak mempunyai apa-apa penyakit.

The learned Sessions Judge failed to consider the evidence of Dr. Azizah in its totality and went on to reject her testimony on the ground that she stated in her evidence that a post-mortem could have determined the real cause of death and no post-mortem was carried out in this case. However, the learned Sessions Judge did not consider or failed to give due weight to her evidence where she unequivocally stated that the cause of death was upper GITB. She further stated that she came to that finding after having examined the deceased before he passed away. Under cross-examination she explained that she didn't do the post-mortem because she was satisfied with the cause of death of the

deceased. The learned Sessions Judge in this case dismissed the evidence of a medical doctor as being unreliable and instead opted to rely on the evidence of the plaintiff and the colleagues of the deceased who said that prior to his death the deceased was not suffering from any disease. I do not for a moment doubt their honesty and integrity but certainly that evidence should the light of the medical evidence given by Dr. Azizah. No other medical expert had been called to rebut the evidence of Dr. Azizah, therefore, in the circumstances I am of the view that her testimony was wrongly rejected by the learned Sessions Judge. Having considered the totality of her evidence I am satisfied that she had come to her finding based on her examination of the deceased and it was not a mere conjecture.

For the above reasons I further allow the appeal on the second ground. In the result the appeal is hereby allowed with costs to the appellant both here and in the Court below.

Reported by W.A. Sharif